

**United States Department of Labor
Employees' Compensation Appeals Board**

C.V., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS CANTEEN SERVICE,
St. Louis, MO, Employer**

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**Docket No. 06-1512
Issued: October 17, 2006**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Chief Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On May 27, 2006 appellant filed a timely appeal of the May 4, 2006 decision of the Office of Workers' Compensation Programs, which found that his request for reconsideration was untimely filed and failed to demonstrate clear evidence of error. Because more than one year has elapsed between the most recent merit decision dated September 29, 2003 and the filing of this appeal, the Board lacks jurisdiction to review the merits of appellant's claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3(d)(2).

ISSUE

The issue is whether the Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

FACTUAL HISTORY

On December 20, 2002 appellant, then a 43-year-old program specialist, filed a traumatic injury claim alleging that on January 25, 2002 he moved three file cabinets weighing in excess of

250 pounds approximately 200 yards and sustained sciatica nerve damage which resulted in a microdiscectomy. The employing establishment controverted the claim.

By decision dated June 18, 2003, the Office denied appellant's claim, finding that the medical evidence did not establish that his sciatic nerve damage was causally related to the January 25, 2002 incident. On July 8, 2003 appellant requested review of the written record and submitted further evidence. In a decision dated September 29, 2003, the hearing representative found that the medical evidence was insufficient to establish that the accepted incident caused or contributed to appellant's herniated disc for which he underwent surgery on May 20, 2002. The hearing representative affirmed the Office's decision denying benefits.

By letter dated March 25, 2006, appellant requested reconsideration. He submitted argument concerning his claim and updated the Office with regard to his current condition. Appellant did not submit any new medical evidence.

By decision dated May 4, 2006, the Office denied appellant's request for reconsideration finding that it was untimely filed and failed to show clear evidence of error.¹

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

"The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may--

(1) end, decrease or increase the compensation awarded; or

(2) award compensation previously refused or discontinued."

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.607(a) provides that an application for reconsideration must be sent within one year of the date of the [Office] decision for which review is sought. The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted under 5 U.S.C. § 8128(a).²

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows clear

¹ On appeal, appellant submitted additional medical evidence; however, the Board may not consider new evidence on appeal. See 20 C.F.R. § 501.2(c).

² *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

evidence of error on the part of the Office.³ 20 C.F.R. § 10.607(b) provides: The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of the Office in its most recent merit decision. The application must establish, on its face, that such decision was erroneous.

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁴ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.⁵ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.⁶ This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.⁷ To show clear evidence of error, the evidence submitted must not only be a clear procedural error but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.⁸ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.⁹

ANALYSIS

The most recent merit decision by the Office is the hearing representative's decision dated September 29, 2003. Appellant had one year from the date of that decision to request reconsideration but he did not do so until March 25, 2006. Accordingly, the Board finds that appellant's application for review was not timely filed within the one-year limitation set forth in 20 C.F.R. § 10.607(a).

The Office properly found that appellant's request for reconsideration did not demonstrate clear evidence of error pursuant to 20 C.F.R. § 10.607(b). The Office denied appellant's claim as he failed to submit rationalized medical evidence establishing that the incident of January 25, 2002 resulted in his back condition or need for surgery. Appellant submitted no new medical evidence with his request for reconsideration. Rather, he reargued his claim and contended that he was entitled to benefits under the Act. Appellant failed to establish clear evidence of error on the part of the Office and it properly denied reconsideration.

³ *Charles J. Prudencio*, 41 ECAB 499 (1990).

⁴ *See Dean D. Beets*, 43 ECAB 1153 (1992).

⁵ *See Leona N. Travis*, 43 ECAB 227 (1991).

⁶ *Id.*

⁷ *Nelson T. Thompson*, 43 ECAB 919 (1992).

⁸ *Leon D. Faidley*, *supra* note 2.

⁹ *Gregory Griffin*, 41 ECAB 186 (1989), *petition for recon. denied*, 41 ECAB 458 (1990).

CONCLUSION

The Office properly found that appellant's request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated May 4, 2006 is affirmed.

Issued: October 17, 2006
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board